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In the Supreme Court of the United States

OCTOBER TERM, 1996

LOUIS SILVERMAN, DIANE SILVERMAN,
URBAN SEARCH MANAGEMENT
and DEVELOPMENT MANAGEMENT GROUP, INC.
Petitioners,

v.

THOMAS WALKER, ANTHONY TYUS, HOPE FAIR
HOUSING, INC., LEADERSHIP COUNCIL
FOR METROPOLITAN OPEN COMMUNITIES;
INTERFAITH HOUSING CENTER and
SOUTH SUBURBAN HOUSING CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Are traditional principles of mitigation of damages inapplicable to plaintiffs who claim a violation of the Fair Housing Act?

II. Should this Court resolve the conflict among the Circuits over the proper standard of review for determining whether a federal civil trial error is "harmless error?"

III. In light of the Court's grant of certiorari in General Electric Co. v. Joiner, No. 96-188, should this case be held to determine whether the appellate court applied the proper standard of review to the trial court's decision to exclude expert testimony?

LIST PURSUANT TO RULE 14(1)(b) and RULE 29.6

The caption names all the parties to the case.

Petitioners Urban Search Management and Development Management Group are not public companies and have no parent companies or nonwholly owned subsidiary companies.

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OPINIONS BELOW

The opinion by the Court of Appeals for the Seventh Circuit is reported at 102 F.3d 256 (1996) and is set forth in the appendix at App-1. The order denying the petition for rehearing is unpublished and is set forth in the appendix at App-18. The judgment of the District Court for the Northern District of Illinois is unreported and is set forth in the appendix at App-21.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 6, 1996. A timely petition for rehearing was denied by order entered January 6, 1997. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fair Housing Act, 42 U.S.C. § 3604(c), provides that, "it shall be unlawful":

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex, handicap, familial status, or national

> origin, or an intention to make any such preference, limitation or discrimination.

28 U.S.C. § 2111 provides that:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 61 of the Federal Rules of Civil Procedure provides that:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the

> proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE

On April 9, 1992, plaintiffs, two individuals and four fair housing advocacy groups, filed an action in the District Court for the Northern District of Illinois alleging a violation of the Fair Housing Act, 42 U.S.C. § 3601, et seq., and seeking injunctive relief, a declaratory judgment, compensatory and punitive damages, and costs and attorneys' fees. The plaintiffs claimed that the defendants, Louis Silverman, Diane Silverman, Development Management Group ("DMG") and Urban Search Management ("USM"), caused the publication of racially discriminatory advertisements for rental housing at an apartment complex in Chicago known as The New York.[1]

The plaintiffs complained primarily of two alleged Fair Housing violations: first, that a number of advertisements featured white models only; and, second, that several advertisements omitted the equal opportunity slogan or logo.

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[1] Louis Silverman was the president and owner of DMG, the developer, which had an ownership interest in The New York. USM was the property manager, and defendant Diane Silverman, for a time, was president of USM. (R.270-1, pp. 338-43, 357; R.241, p. 1039)

Briefly, the relevant facts are as follows:

Construction of The New York, a luxury building featuring small apartments, excellent services, and a convenient location, began in 1985. In 1989, the building's marketing committee developed an advertising campaign that featured live subjects. Some of the advertisements used the building's actual concierge; others featured pictures of people in the neighborhood engaged in various activities. An African-American man was shown entering Wrigley Field, but, to the extent the race of other individuals could be identified, the people in the ads appeared to be primarily white. (R.239, pp. 45-46, 188-89; R.241, p.1062; R.270-2, pp. 863, 953).

Louis Silverman repeatedly directed that the equal opportunity logo or slogan be included in all advertisements. Nevertheless, some of the print advertisements inadvertently omitted the logo or slogan, and some five or six radio advertisements did not contain equal opportunity statements. (R.237, p.629; R. 239, pp. 70, 184-86, 191-92, 205-06; R.270-1, p.434; R.270-2, pp. 944, 963; R.241, pp. 1006-09)

The New York ran a total of 358 newspaper advertisements. Only 87 used pictures of people and 27 of those featured the building's actual concierge. (R.241, p. 1086) In total, about 60% of the 358 print ads included the equal opportunity logo or slogan. Some 13% of the 87 advertisements featuring live subjects inadvertently omitted the slogan or logo. (R.241, p.100)

Both of the individual plaintiffs, Thomas Walker and Anthony Tyus, testified

that they became aware of the advertising campaign for The New York as early as 1989, and that it made them feel unwelcome and hurt. (R.239, pp. 94-103; 240-46; R.270-1, p.476) Tyus, who was on the Board of Directors of plaintiff Hope Fair Housing, contacted Hope. Walker, who was on the Board of plaintiff Leadership Council, contacted that organization. The plaintiffs, along with their attorneys, began to "monitor" the ads. This "monitoring" process took three years, and, according to the plaintiffs, hundreds of hours of work. (R.239, pp.23-34, 90-94, 103-04, 128-35; 138-41, 237-38, 244-46; R.270-1, p.320-24)

At no time did any of the plaintiffs contact Louis or Diane Silverman to advise them that some of their advertisements omitted the equal opportunity logo or slogan or to tell them that the ads featuring white models were perceived of as preferential. (R.239, pp.94, 107-09, 116-18; R.241, p.1014; R.270-1, pp.333-34)

The jury, which was given a questionnaire with four separate questions, found, in response to question one, that the ad campaign was preferential, but that only Louis Silverman was responsible.[2] Turning to question two, the jury found that the campaign did not cause any of the plaintiffs actual injury.

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[2] Louis Silverman, in the words of one witness, was the "boss;" he had "final responsibility" or the "final word" for approving all advertisements. (R.237, pp.618-19, 677; R.270-1, pp.358-63; R.239, pp.167-68)

On appeal, the plaintiffs raised several issues, including an attack on the conduct of both the court and defense counsel, and a challenge to the jury verdict as inconsistent with the evidence. The Seventh Circuit criticized defense counsel, and found fault with the trial judge's questioning of one juror during the jury selection, but it did not conclude that those errors justified reversal. App-5-8. The court also did not conclude that the evidence was insufficient to support the verdict.

Nevertheless, the Seventh Circuit reversed the verdict as to all the defendants, even Diane Silverman and the two corporate defendants, who the jury found were not responsible for the preferential advertising, because, according to the court, the trial court erred in excluding expert testimony that would have addressed the harm suffered by African-Americans on viewing preferential advertising, and because of jury instructions, including a mitigation of damages instruction, which dealt only with the measure of damages. App-8-15.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE PLAINTIFF HAS AN OBLIGATION TO MITIGATE DAMAGES UNDER THE FAIR HOUSING ACT

One of the instructions that the Seventh Circuit found fault with was a standard mitigation of damages instruction that told the jury that the plaintiffs could not recover for any damages they could have "avoided through reasonable effort." (R. 240, pp. 1207-08) The court

gave the instruction because the plaintiffs were aware of the advertisements for The New York for at least three years before they commenced a lawsuit, but made no effort to contact any of the defendants to discuss changing the advertising campaign. Nevertheless, the plaintiffs sought to recover for damages they allegedly incurred all during the three year "monitoring" process.[3]

Although the evidence justified a mitigation instruction, the Seventh Circuit held that, in a Fair Housing litigation, it is error as a matter of law to instruct the jury on mitigation of damages. App-12. In holding that principles of mitigation are inapplicable in the Fair Housing context, the Seventh Circuit created a dangerous precedent that is in conflict with other case law and that will likely have wide and unfortunate repercussions, both legal and practical. This Court should grant certiorari to resolve whether there are legitimate policy reasons for exempting Fair Housing plaintiffs from the traditional duty to mitigate damages.[4]

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[3] The plaintiffs testified to the damages they allegedly suffered during the lengthy monitoring process: among other things, for the organizational plaintiffs, the costs of weekly meetings among themselves and with their attorneys where they discussed The New York as well as many other matters, and for the individual plaintiffs, the hurt they continued to experience on viewing the ads.

[4] There was no claim in this case that the instruction, which is reproduced in its entirety at App-23, incorrectly stated mitigation law. In fact, the instruction

The so-called duty to mitigate, in reality, is a misnomer since it does not place an independent obligation on the plaintiffs. 1 Dobbs, Law of Remedies, ¶ 3.9 at 380 n.5 (1993). It simply ensures that, once liability has been established, the plaintiff's recovery fairly represents the damages attributable to the defendant's conduct. See, e.g., 4 Sand, et al, Modern Federal Jury Instructions - Civil, ¶ 77.01 (1996) ; 3 Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions - Civil ¶ 85.13 (1987). Disallowing recovery for damages that could have been avoided with reasonable efforts has long been a guiding principle of damages in virtually all areas of the law. 1 Dobbs, supra, at 380.

Civil rights plaintiffs have never been considered exempt from this traditional requirement. Section 1983 plaintiffs are required to make reasonable efforts to minimize their damages. 1 Schwartz & Kirklin, Section 1983 Litigation, ¶ 16.14 (1991). See also Murphy v. City of Flagler Beach, 846 F.2d 1306 (11th Cir. 1988); Smith v. Rowe, 761 F.2d 360, 366-67 (7th Cir. 1985); Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977); O'Neal v. Gresham, 519 F.2d 803 (4th Cir. 1975).

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was an accurate statement of well-established mitigation principles. It made clear to the jury that the plaintiffs were not required to exercise unreasonable efforts to minimize damages and it correctly placed the burden of demonstrating a failure to mitigate squarely on the defendants.

Title VII of the Civil Rights Act of 1964 explicitly requires the plaintiff to mitigate damages, 42 U.S.C. § 2003-5(g), and the courts have incorporated a mitigation requirement into other civil rights statutes protecting employment rights, even when the statute itself is silent on the subject. See, e.g., Johnston v. Harris County Flood Control District, 869 F.2d 1565 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990) (ADEA); Carden v. Westinghouse Elec. Corp., 850 F.2d 996 (3d Cir. 1988) (ADEA); Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1115 n.9 (3d Cir. 1988), cert. denied, 492 U.S. 905 (1989) (§1981); Hanna v. American Motors Corp., 724 F.2d 1300 (7th Cir.), cert. denied, 467 U.S. 1241 (1984) (Vietnam Era Veterans Readjustment Assistance Act).

The Fair Housing Act, as is typical of most statutes, does not mention mitigation of damages. Nevertheless, the two courts to address damages have recognized that there is a mitigation requirement. See Miller v. Apartments and Homes of New Jersey, Inc., 646 F.2d 101, 111 (3d Cir. 1981) (affirming the district court's finding that plaintiffs had not failed to mitigate damages in a case involving a discriminatory refusal to rent, and a substitute apartment at a higher rental); Young v. Parkland Village, Inc., 460 F. Supp. 67, 71 (D. Md. 1978) (determining that plaintiff was not entitled to damages for period after she refused an appropriate apartment since "as in any case, the plaintiff here had a duty to mitigate damages").

The Seventh Circuit, in disregard of this vast and consistent body of law, determined that plaintiffs alleging violations of the Fair Housing Act --

unlike plaintiffs seeking redress for violation of virtually every other civil rights act -- are exempt from mitigation requirements and, unlike other plaintiffs, can sit idly by and allow their damages to accumulate. As the court explained it, under the Fair Housing Act, mitigation "is not required for intangible losses or organizational claims." App-12.[5]

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[5] The Seventh Circuit acknowledged that courts have imposed a mitigation requirement under the Fair Housing Act when a person is denied housing, but distinguished cases involving "intangible losses or organizational claims." App-12. That distinction makes no sense. The plaintiff-organizations in this case claimed tangible losses, including the costs of monitoring the allegedly preferential ads. And claims for emotional harm are not immune from mitigation requirements. The Illinois courts, for example, have required plaintiffs to mitigate damages in libel cases. See, e.g., Layne v. Builders Plumbing Supply Co., 210 Ill. App. 3d 966, 975 , 569 N.E.2d 1104, 1110 (2d Dist. 1991); Harrel v. Dillards Department Stores, Inc., 268 Ill. App. 3d 537, 644 N.E.2d 448 (5th Dist. 1994). The Seventh Circuit itself, in a civil rights tort case, noted that damages associated with mental and emotional distress are offset by "so much of the loss as might have been averted by reasonable efforts to mitigate damages." Patterson v. Portch, 853 F.2d 1399, 1407 (7th Cir. 1988). See also Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1276 (3d Cir. 1977) (jury was properly instructed that plaintiff's failure to seek medical advice could reduce his damage

The opinion below, which is the first to directly address mitigation in the context of a preferential advertisement claim, is likely to be cited and relied on for the broad proposition that mitigation is not a requirement of the Fair Housing Law. At a minimum, it will exempt Fair Housing plaintiffs from traditional mitigation requirements when the plaintiffs are organizations or individuals seeking to recover for intangible harm. While the Seventh Circuit apparently believed that there were policy reasons for the exemption, the rule it announced impedes rather than advances the purposes of the Fair Housing Act.

The Act is intended to expand the opportunities "for fair housing throughout the United States." 42 U.S.C. § 3601. Preferential advertisements limit access to fair housing and consequently are prohibited under the Act. 42 U.S.C. § 3604(c). A mitigation requirement would encourage potential plaintiffs who view advertisements they consider preferential to notify possible violators after a reasonable time. Notification will often result in the cessation of the offensive advertising campaign -- the very goal sought by the Act.[6]

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award in claim for negligent infliction of emotional distress).

[6] That notification can achieve quick and beneficial results is not a matter of speculation. Both plaintiff Walker and Bernard Kliena, a representative of plaintiff Hope Fair Housing, testified at trial that on several occasions when they contacted developers or advertisers complaining about their ads, the ads were

Without a mitigation requirement, plaintiffs can "monitor" a series of advertisements for years on end, allowing their individual damages to amass, but doing nothing to stop the dissemination of the allegedly hurtful advertisements. Plaintiffs under the Fair Housing Act are purporting to act as private attorneys general; their actions, therefore, should be guided by the public good, not by any private profit motive. Big damage awards might benefit individual plaintiffs, but, during the time when individual damages are accumulating, the public would continue to be deprived of fair housing opportunities, circumventing the goals of the Act itself.

A mitigation requirement would not, as the Seventh Circuit seemed to believe, prevent plaintiffs from conducting an adequate investigation or from demonstrating a persistent violation of the Act. Plaintiffs would not be forced to prematurely commence an action, nor would they be barred from recovery if they did not notify the alleged violator. Mitigation is a principle of damages only and does not preclude recovery once liability has been established. It only limits the amount of recovery after the alleged violation has occurred and has caused an injury.

The decision below is wrong as a matter of law, is in conflict with well-developed law, is likely to have a great impact on the future course of Fair Housing litigation, and is ultimately unwise. This Court should grant certiorari in this case

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changed and the matter was resolved without the filing of a lawsuit. (R.237, pp. 544, 565-67, 589-90; R.239, pp. 106-07)

to address this important question and to correct what is likely to be an influential, but misguided, decision.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER THE HARMLESS ERROR STANDARD IN CIVIL CASES

In McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984), this Court held that, in civil cases, federal courts must engage in some form of harmless error review.[7] The Court, however, did not address what the standard of review should be, or whether the same standard should apply in civil and criminal cases.

The federal appellate courts have grappled with this question, but have reached inconsistent results. Some courts apply the same harmless error rule that is applied in a criminal case. Others distinguish between civil and criminal cases and use a less rigorous standard in civil cases. Still others, like the court here, develop harmless error rules to suit the case before them.

The Circuits have acknowledged the confusion and conflict in this area and have articulated their concern over the appropriate standard to apply. See, e.g., Haddad v. Lockheed California Corp., 720 F.2d 1454, 1457-59 (9th Cir. 1983); McQueeney v. Wilmington, 779 F.2d 916, 924-27 (3d Cir. 1985); United States Industries, Inc. v. Touche Ross & Co., 854

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[7] Rule 61 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2111, both of which incorporate harmless error principles, are set out at pp. 2-3, supra.

F.2d 1223, 1252, n.39 (10th Cir. 1988) (all discussing the conflict at great length). The conflict over this very basic principle should be resolved by this Court.

Three Circuits -- the Third, the Eleventh and the District of Columbia -- have decided that the same standard of review should apply in civil and criminal cases. Consequently, these courts apply the stringent standard of review set forth in Kotteakos v. United States, 328 U.S. 750 (1946). See, e.g., McQueeney v. Wilmington, 779 F.2d 916, 924 (3d Cir. 1985) ("errors are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights"); Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153, 1159 (11th Cir. 1986); Williams v. United States Elevator Corp., 920 F.2d 1019, 1022-23 (D.C. Cir. 1990).

Some commentators have argued that a distinction should be drawn between civil and criminal cases, largely because of the less exacting burden of proof in civil cases, which permits a greater margin of error. Saltzman, The Harm of Harmless Error, 59 Va. L. Rev. 988, 991-93 (1973). Adopting this view, the Eighth, Ninth and Tenth Circuits have held that, in a civil case, a less rigorous standard, and one that is less likely to result in reversals, is more appropriate. Under this standard, an appellate court "need only find that the jury's verdict is more probably than not untainted by the error." Haddad v. Lockheed California Corp., 720 F.2d 1454, 1459 (9th Cir. 1983). See also United States Industries, Inc. v. Touche Ross & Co., 854 F.2d 1223, 1252, n.39 (10th Cir. 1988) ("the appropriate standard of review in a civil case for determining whether an error was harmless is whether the substantial

rights of the parties were more probably than not unaffected by the error"); McIlroy v. Dittmer, 732 F.2d 98, 105 (8th Cir. 1984) (same).

Still other courts have applied an even less rigorous standard, holding that an error is harmless unless it "would have changed the outcome." See Elwood v. Pina, 815 F.2d 173, 177 (1st Cir. 1987). See also American Home Assurance Co. v. American President Lines, Ltd., 44 F.3d 774, 777 (9th Cir. 1994) ("nothing indicates that a different conclusion would have resulted if the district court had not erred...").

In this case, the Seventh Circuit went to the other extreme. To the extent it engaged in harmless error review at all, it applied a standard that robbed the harmless error doctrine of any meaning. The appellate court found error in three jury instructions, all of which dealt with the amount and method of determining the plaintiff's damages.[8] It then reversed the jury verdict, even as to the three exonerated defendants, and even though the jury was instructed not to address damages until it determined liability, because the jury's verdict "may have been influenced by any one of [the instruction] errors." App-11 (emphasis added).

In addition, the court, without even mentioning the harmless error doctrine, held that the district court erred in

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[8] The three contested jury instructions dealt with mitigation of damages, whether the plaintiffs suffered actual injury, and the cut-off point for awarding damages.

excluding the testimony of a purported expert about how African-Americans perceive discriminatory advertising, although the expert would not have offered any testimony that would have demonstrated that Mrs. Silverman or the corporate defendants shared responsibility for the challenged advertising practices.[9]

How a court decides whether a trial error is harmless has a significant impact on whether the error results in a reversal in a particular case. Indeed, those that advocate a distinction between civil and criminal cases argue that employing the stringent criminal standard of harmless error will result in an inordinate number of civil reversals. Saltzman, supra, 59 Va. L. Rev. at 997.

This case makes glaringly apparent the striking effect the applicable standard of review can have on the outcome of a case. In this case, any error in the instructions about damages could not realistically have affected the jury's verdict exonerating Diane Silverman and the corporate

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[9] The expert, Dr. John Tarini, was excluded by the district court after a lengthy voir dire, not because the court thought that the area about which Dr. Tarini would provide evidence was not appropriate for expert testimony, but on the ground that he was not qualified to testify to "the particular question he is being offered on." (R.270-1, p.298, 302) The appellate court disregarded this ground for exclusion, although a review of an expert's qualifications are ordinarily left to the discretion of the district court. See, e.g., United States v. Hughes, 970 F.2d 227, 235 (7th Cir. 1992).

defendants, since the jury was instructed not to deliberate about damages until it decided liability, and, presumably, the jury followed its instructions. Surely, applying the less rigorous standard of the Eighth, Ninth and Tenth Circuits, the substantial rights of the plaintiffs were "more probably than not unaffected by the error."

Litigants before the federal courts must now include within their appellate briefs a statement of the applicable standard of review. Fed. R. App. Pro. 28(a)(6). The standard of review may well be the dispositive factor in the outcome of a case. It is not appropriate for different courts to have different rules on so crucial a matter. Whichever standard of harmless error review is proper -- and, we believe, it is not the standard utilized in this case, which renders virtually every error harmful as a matter of law -- this is an issue that is ripe for resolution.

III. SINCE THIS CASE POSES THE QUESTION FOR WHICH CERTIORARI WAS GRANTED IN GENERAL ELECTRIC V. JOINER, IT SHOULD BE HELD FOR A DETERMINATION OF WHETHER THE APPELLATE COURT APPLIED THE PROPER STANDARD OF REVIEW OF THE TRIAL COURT'S DECISION TO EXCLUDE EXPERT TESTIMONY

As already noted, one of the grounds for reversal was the trial court's exclusion of the expert testimony of Dr. John Tarini on the question of how African Americans would perceive advertising featuring primarily white subjects. The Seventh Circuit engaged in a de novo review of the record, substituting its own judgment for the judgment of the district court, without mentioning the standard of

review. App-9-11 Certainly, the court did not apply the deferential standard of review adopted by most of the Circuits.

Only recently, in General Electric v. Joiner, No. 96-188 (March 18, 1997), granting certiorari to 78 F.3d 524 (11th Cir. 1996), this Court granted certiorari to resolve an issue related to the issue posed in Question 2 of this petition: that is, the proper standard of appellate review of trial court decisions excluding expert testimony. Since the proper standard of review is an issue posed in this case, this petition should be held until a decision is rendered in Joiner. If this Court determines that a more deferential standard is required, the case should be remanded for reconsideration and further briefing in light of the Court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 1, 1997
New York, New York

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 95-3793 and 95-3932

ANTHONY TYUS, *et al.*,

Plaintiffs-Appellants, Cross-Appellees,

v.

URBAN SEARCH MANAGEMENT, *et al.*,

Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 92 C 2423 and 93 C 5071—Henry A. Mentz, *Judge**

ARGUED APRIL 11, 1996—DECIDED DECEMBER 6, 1996

Before POSNER, *Chief Judge*, and EASTERBROOK and DIANE P. WOOD, *Circuit Judges*.

DIANE P. WOOD, *Circuit Judge*. The New York is an upscale apartment house located on North Lake Shore Drive in Chicago. Believing that the advertisements its owners used to lure potential tenants to The New York were racially discriminatory, in violation of the Fair Housing Act, 42 U.S.C. § 3604, Anthony Tyus, Thomas Walker, and a number of fair housing groups brought this case against the individuals (and their wholly owned companies)

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* District Judge, U.S. District Court for the Eastern District of Louisiana, sitting by designation.

who developed, operated, and managed The New York. With one minor exception, defendants prevailed at an unusually contentious jury trial. On appeal, the plaintiffs, supported by the Equal Employment Opportunity Commission and the National Fair Housing Alliance as *amici curiae*, raise a host of issues relating principally to the conduct of the trial and the jury instructions. We agree that the case must be reversed and remanded for a new trial, in light of several critical errors in both evidentiary rulings and the instructions.

I

In 1985, defendant Development Management Group (DMG), which was owned by defendant Louis Silverman, b[illegible]an construction of The New York. When the building, a 593-unit luxury high-rise, was completed, DMG turned the management responsibilities over to defendant Urban Search Management ("Urban Search"), which was owned by Silverman's wife, defendant Diane Silverman. (Unless the context requires greater specificity, we refer to the defendants collectively as the Silvermans.) Louis and Diane Silverman both served on The New York's marketing committee, which created an aggressive advertising campaign designed to attract "desirable" tenants to the building (professionals between the ages of 25 and 40 with significant disposable income). Plaintiffs Thomas Walker and Anthony Tyus, both African-Americans, noticed in the course of their own private efforts to find housing in the Chicago area that the advertisements for The New York, whether in the form of billboards, newspaper ads, or brochures, featured only White human models. Walker passed along his observations to the Leadership Council for Metropolitan Open Communities, while Tyus called HOPE Fair Housing to report what he had seen.

In short order, the Interfaith Housing Center and the South Suburban Housing Center were also brought into the case, and all four organizations began monitoring the advertisements for The New York, as well as for other

apartments. This activity went on from 1989 through 1992. The New York continued its exclusive use of White human models in its billboard and newspaper advertisements. Radio advertisements were aired that made no reference to The New York's commitment to being an equal housing opportunity provider, and many of the print advertisements omitted the Equal Opportunity Logo. This was a significant omission. The federal government provided a $4 million Urban Development Action Grant for use by the Silvermans' companies in development of The New York project. Under the Department of Housing and Urban Development regulations then in effect, the omission of the logo and the lack of any reference to an equal opportunity policy was a factor used in determining whether a landlord was in compliance with the Fair Housing Act's prohibitions against discrimination in advertising. 24 C.F.R. § 109.30 (1995). The Silvermans' companies also enjoyed the benefit of $62.6 million in tax-exempt bonds issued by the City of Chicago in conjunction with The New York project, which obligated them to abide by non-discriminatory practices. Chicago, IL, Municipal Code §§ 2-32-970(c) and 2-32-1050 (1990).

Only after the plaintiffs filed the present lawsuit did The New York's advertising consultant prepare any advertisement depicting a racially diverse group of people, and the one ad the consultant prepared did not appear in the publications normally used by The New York, such as the *Chicago Tribune* and *The Chicago Reader*. The two individual plaintiffs and the four organizational plaintiffs filed their complaint on April 9, 1992, claiming that the Silvermans and their respective corporations had engaged in the practice of "selective advertising," in violation of the Fair Housing Act, 42 U.S.C. § 3604(c), and the regulations issued under that section. They sought injunctive relief, a declaratory judgment, compensatory and punitive damages, and costs and attorneys' fees. After a seven-day jury trial, however, the jury found in favor of DMG, Urban Search, and Diane Silverman on all points, and it found that although Louis Silverman had caused racially

discriminatory advertisements to be printed, the plaintiffs had suffered no compensable damages. The district court awarded the defendants costs, but it declined to grant their request for attorneys' fees.

II

The Fair Housing Act prohibits racial discrimination of all kinds in housing. Section 3604(c) makes it unlawful in particular

> [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race [or] color . . . or an intention to make any such preference, limitation, or discrimination.

The implementing regulations in effect at the relevant time provide more detail, stating for example that "an advertising campaign using human models primarily in media that cater to one racial or national origin segment population without a complementary advertising that is directed at other groups" may be a violation. 24 C.F.R. § 109.25(c) (1995). The regulations also state that models used in display advertising "should be clearly definable as reasonably representing the majority and minority groups in the metropolitan area," 24 C.F.R. § 109.30(b) (1995), and that models "should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race." *Id.*

Extensive evidence relating to the advertisement campaign and its discriminatory qualities was introduced at the trial. Indeed, the jury must have been persuaded that the campaign was discriminatory, given its verdict against Louis Silverman. Nevertheless, the plaintiffs argue that the jury's finding that Louis Silverman's actions caused them no damages, as well as its exoneration of the other three defendants, is the product of errors that riddled the

trial from start to finish. Moreover, they argue that they are entitled to a new trial because both the presiding judge and defense counsel prejudiced their case so severely in front of the jury that they did not get a fair hearing. For example, they assert that the judge intervened inappropriately on a number of occasions and allowed defense counsel to treat the plaintiffs' lawyer in a sexist and demeaning way. The defendants, in addition to defending the trial and its outcome, argue essentially that all's fair in love and war, and that test cases are somehow not entitled to the respect that other litigation enjoys. We have nothing good to say about the tone of this trial, and we emphasize how important it is for judges, attorneys, and litigants alike to treat everyone in the court with respect, in an atmosphere free of racial, sex-related, or other forms of bias. Defense counsel behaved inexcusably, referring to plaintiffs' lawyer disparagingly as "an amateur" on numerous occasions. He interfered with counsel's legitimate attempts to raise objections, barking at her to "sit down" and "stop interfering," and claiming in the presence of the jury that she "didn't know the rules." He literally grabbed papers out of her hands (all of this, we note, without any reprimand from the judge). Personal attacks on counsel and remarks that disparage others on the basis of sex or race have no place in the courtrooms of this Circuit. Here, we do not need to consider whether this conduct standing alone would have required a new trial, because we conclude that the specific errors discussed below require this step in any event. We turn then to the most important specific errors, which fall into three categories: error in the jury selection process, error in the treatment of plaintiffs' proffered expert witnesses, and error in the jury instructions.

A. Jury Selection

During the initial voir dire of the jury panel, the following exchange took place between the court and one of the prospective jurors, Mr. Jackson:

THE COURT: Does anybody on the panel reside in public housing? I am sure everybody knows what public housing is.

MR. JACKSON: Yes.

THE COURT: Would you stand up and tell us about it, please?

MR. JACKSON: Public housing?

THE COURT: I can't hear what you're saying.

MR. JACKSON: I didn't hear you.

THE COURT: Do you reside in public housing?

MR. JACKSON: Yes.

THE COURT: What is the name of it?

MR. JACKSON: Chicago Housing Development.

THE COURT: Chicago Housing & Development. Would the fact that you reside there—is that an Afro-American housing or mixed?

MR. JACKSON: Mostly Afro-American.

THE COURT: Has there been any racial problems in that project?

MR. JACKSON: Yes.

THE COURT: Would that interfere in any way with you coming up with a fair and impartial verdict if you're selected on a jury?

MR. JACKSON: I can't really say.

Based on this exchange, the court excused Mr. Jackson for cause.

The problem with this decision was not the fact that the court excused someone for cause once he said that he was unable to say whether or not the subject under discussion would influence his ability to reach a fair and impartial verdict. It was instead the anterior problem of

the court's decision to inject this line of inquiry, in the manner it did, into the questioning. While the trial court is granted broad discretion in directing inquiry at voir dire, that discretion is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931); *United States v. Guy*, 924 F.2d 702, 707 (7th Cir. 1991). It is the duty of the trial court to ensure that collateral or unrelated issues are not brought into the case through the voir dire process. *United States v. Daily*, 139 F.2d 7, 9 (7th Cir. 1944). Here, the question whether any members of the venire lived in public housing was not pertinent to any issue in the case. A trial judge may not determine juror eligibility based on external associations that are irrelevant to the case before him, regardless of what assumptions the judge himself may harbor about those associations. See *United States v. Salamone*, 800 F.2d 1216, 1225 (3d Cir. 1986) (holding in the context of a criminal jury that to allow a determination of juror eligibility based solely on perceptions of the external associations of a juror would threaten the right of an accused to a fair trial by an impartial jury as well as the integrity of the judicial process as a whole). Furthermore, it was inappropriate for the court to ask about the racial composition of Mr. Jackson's residence, implying perhaps that public housing is likely to be plagued by racial problems, or that racial problems might arise if African-Americans were present. This injected a note of prejudice into the trial that plaintiffs had no way of overcoming, because the entire group of prospective jurors was exposed to it. The questioning was stigmatizing not only to Mr. Jackson, who was put on the spot in an embarrassing way in front of his fellow prospective jurors, but also by implication to the plaintiffs and their case. Inquiry of this nature would be unacceptable had it come from counsel; that it came from the court itself makes it all the more egregious, for "a critical function of a trial judge is to ensure that th[is] very type of highly inappropriate and irrelevant racially charged commentary . . . gets no play before the jury." *Rush v. Smith*, 56 F.3d 918, 924 (8th Cir. 1995) (Hansen, *J.*, concurring).

This questioning went beyond the bounds of permissible inquiry during voir dire. Had this been an isolated incident, it may have qualified as harmless error. Unfortunately, it was not; it was instead a harbinger of the judge's approach toward the entire trial. For example, the judge permitted the defendants to argue that the *Chicago Tribune*'s notice that *the newspaper* did not engage in discriminatory practices in its housing advertisements meant that The New York's discriminatory ads were harmless. The judge's remarks implied that the publisher's notice "certifies" that all advertisements were by *advertisers* who observe the fair housing laws—an inaccurate statement. Because we find below that other errors in the trial even more clearly call for reversal and a new trial, it is unnecessary to decide whether these incidents would also have justified such a ruling. Nevertheless, they demonstrate that the other matters were, in effect, just the most egregious in a trial that suffered from many problems.

B. Expert Witnesses

Plaintiffs argue that the district court erred in excluding the testimony of their two expert witnesses: Dr. Douglas Massey, a professor of sociology at The University of Chicago, who would have testified about the history and patterns of housing discrimination in Chicago, and Dr. John Tarini, a psychologist, statistician, and chair of the Department of Marketing Communication at Columbia College (Chicago), who would have testified about how advertising sends a message to its target market and how an all-White advertising campaign affects African-Americans. The court excluded Dr. Massey's testimony on the grounds that it would range too far afield into the history of housing discrimination in Chicago and would thus be prejudicial and not sufficiently linked to the issue of The New York's advertising. After a lengthy proffer relating to Dr. Tarini's background and proposed testimony, the court concluded that he was not qualified to testify to the particular question of how the ordinary reader would react to The New York ads. In neither of its rulings on the

experts did the court make use of the framework established by *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

We have noted a number of times since the Supreme Court decided *Daubert* that its framework for assessing expert testimony is applicable to social science experts, just as it applies to experts in the hard sciences. See, *e.g.*, *United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996) (requiring application of *Daubert* standard to social psychologist tendered as expert witness); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996); *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186 (7th Cir. 1993) (requiring application of *Daubert* standard to accountant tendered as expert witness). Social science testimony, like other expert testimony proffered under Fed. R. Evid. 104(a) for admission under Rule 702, must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony "adheres to the same standards of intellectual rigor that are demanded in [her] professional work." *Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996); *cf. Rosen v. Ciba-Geigy Corp.*, 78 F.3d at 318-19. At that level of generality, the *Daubert* framework is appropriate for all kinds of expert testimony; we do not agree with the Tenth Circuit's decision in *Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518-19 (10th Cir. 1996), that it is limited to cases of novel scientific theories or methodologies. It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary. Furthermore, we agree with the implication in *Compton* that genuine expertise may be based on experience or training. In all cases, however, the district court must ensure that it is dealing with an expert, not just a hired gun.

In *Hall*, we described in some detail the methodology that is appropriate in these cases. The court must first consider whether the proffer demonstrated that the work that the scientific expert has done meets the standards of intellectual rigor described in *Braun*, using criteria like

those described in *Daubert* for guidance. Next, it must determine whether the proffered testimony is based upon the expert's special skills. Finally, Rule 702 requires the court to decide whether the proffered testimony will assist the trier of fact to understand or determine a fact in issue. Social scientists in particular may be able to show that commonly accepted explanations for behavior are, when studied more closely, inaccurate. These results sometimes fly in the face of conventional wisdom. The court below erred insofar as it assumed that only evidence completely inaccessible to the jury could come in under Rule 702. As we noted in *Hall*, a trial court is not compelled to exclude expert testimony "just because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension." 93 F.3d at 1342.

In this case, Dr. Tarini was prepared to testify about the way an advertising campaign sends a message to its target market and how an all-White campaign affects African-Americans. This kind of social research, which would demonstrate the way one of the most important industries in our country actually operates, would have given the jury a view of the evidence well beyond their everyday experience. (Indeed, anyone who watches television knows that the major consumer product companies in the country spend billions crafting their advertising campaigns, to reach exactly the right audience, with exactly the right pitch. It is doubtful they are making these decisions by asking six or twelve random people on the street what might appeal to them.) The proffer indicates that both the materials on which Dr. Tarini relied, which were peer-reviewed articles accepted in his profession, and the particular methodology he used, were well within the range contemplated by *Daubert* for expert scientific testimony. Using his admittedly extensive background, Dr. Tarini looked at The New York's ads in particular, using the well known "focus group" method, to see how they came across to African-American viewers. We are satisfied on the record as it was developed in the trial court that it was error to exclude this testimony.

With respect to Dr. Massey, the court had the power to consider under Rule 403 whether the evidence should have been excluded because its relevance was too slim, in light of potential prejudice, to warrant its admission. Testimony about the history and patterns of housing discrimination in Chicago may well have drifted too far from the question whether the advertising campaign for The New York was discriminatory, and it might even have opened the door to rebuttal testimony seeking to show that ads do not affect the racial makeup of a building. Nevertheless, the court failed to use anything like the *Daubert* framework in assessing Dr. Massey's testimony, and it cut off plaintiffs' efforts at establishing a record on the proposed scope of his testimony. This puts us at a significant disadvantage in trying to decide at this remove whether Massey's testimony, properly limited, was pertinent and, if so, how the court should weigh the likely prejudice against the usefulness of the testimony. We believe the best course is to leave it open on remand for the court to consider a new proffer of Dr. Massey's testimony, in light of its relevance to the issues to be tried and the evidence offered by the defendants.

C. Jury Instructions

Our review of jury instructions takes a practical approach, under which a new trial is appropriate only if it appears that the jury was misled and its understanding of the issues was seriously compromised, to the prejudice of the losing party. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1283 (7th Cir. 1995). Regrettably, that standard is satisfied for four separate issues: mitigation of damages, "actual injury," the statute of limitations, and punitive damages. We cannot agree with the defendants that any error was harmless, because the jury's decision not to award any relief to the plaintiffs (in spite of its verdict of liability against Louis Silverman), as well as its decision in favor of the other three defendants, may have been influenced by any one of these errors.

The most serious problem lay in the lengthy instruction the district court gave, at the defendants' request, on mitigation of damages. The court told the jury that a person "has a duty under the law to use reasonable diligence" to avoid or minimize damages and that the plaintiffs could not recover for any item of damage that they "could have avoided through a reasonable effort." At the trial, the defendants repeatedly stressed that individual plaintiffs Tyus and Walker had placed themselves in harm's way by purposely exposing themselves to The New York ads. Defendants argued that the plaintiffs could have avoided the harm if they had only notified The New York's management that the ads were offensive and discriminatory. Finally, the defendants criticized the plaintiffs for monitoring the ad campaign for a three-year period, asserting that they should have brought suit or notified the defendants as soon as they saw an offending ad. This, defendants claimed, would have avoided the alleged emotional and organizational injuries plaintiffs suffered.

The instruction given to the jury, in the context of this case, did not accurately state the law. While mitigation may be appropriate for cases in which a person is denied housing and must find alternative housing, see, *e.g.*, *Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101, 111-12 (3d Cir. 1981); *Young v. Parkland Village, Inc.*, 460 F. Supp. 67, 71 (D. Md. 1978), it is not required for intangible losses or organizational claims, both of which are recoverable in Fair Housing Act cases. See, *e.g.*, *United States v. Balistrieri*, 981 F.2d 916, 933 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 58 (1993); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904-05 (2d Cir. 1993). Thus, the very essence of the court's instruction—that *these* plaintiffs had a duty to avoid their damages—was wrong. The Fair Housing Act does not require notification prior to filing a suit, nor does it require a suit to be filed upon viewing or hearing the first discriminatory ad. Indeed, such a claim would certainly fail, because one ad standing alone would normally be insufficient evidence to show a pattern of discriminatory advertising. See, *e.g.*, *Housing*

Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc., 943 F.2d 644, 648 (6th Cir. 1991); *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991). The discriminatory character of an advertising campaign is often not self-evident, and the law does not automatically make every ad showing persons of only one race actionable. Only when enough ads have run to allow a pattern to emerge is a violation likely to become apparent. Thus, contrary to the defendants' arguments, repeated exposure to discriminatory ads is not masochistic behavior, or something designed only to run up the damages tab, but instead is normally the only way to tell if an advertising campaign as a whole violates the Fair Housing Act. See *Balistrieri*, 981 F.2d at 933; *Ragin*, 923 F.2d at 1002. The jury's mistaken view, based on this instruction, that the plaintiffs could not recover unless they had sued after the first ad, or notified The New York about their concerns, or simply averted their eyes, could easily have made a difference in its verdict.

Second, the court instructed the jury that one element of a Fair Housing Act violation is proof that the defendants' advertisement caused "actual injury." Rejecting plaintiffs' proposed instructions, which would have clearly stated that Tyus and Walker were entitled to compensation for intangible items like distress, indignity, humiliation, or embarrassment, the court instructed that "[a]n individual suffers injury when he proves that the advertisements would indicate a racial preference to the ordinary reader and that he has read the challenged advertisements. Injury to an organizational plaintiff can be established by proof of an actual injury to its efforts to assist equal access to housing." Only much later, when the court was instructing the jury on damages, did it inform them that they could award compensatory damages "if you find that the plaintiff suffered any emotional distress because of the defendants' conduct occurring after April 9, 1990 . . . [and] any amount adequate to compensate [the organizational plaintiffs] for any impairment of [their] objectives and any diversion of [their] resources to programs inde-

pendent of this suit." We address the problem with the date mentioned by the court below; here, we focus only on the confusing nature of the "actual injury" instruction, bearing in mind that the jury heard it in conjunction with the erroneous mitigation instruction.

These instructions could have misled the jury, because the individual plaintiffs did not need to prove they suffered from a tangible injury. Following the instructions step by step, the jury logically would have considered first whether any of the plaintiffs suffered an "actual injury," before it turned to the question whether any component of that injury might have included emotional distress. Again, to the extent the instruction allowed the jury to think that it could not consider the kinds of intangible harms mentioned in the plaintiffs' proposed instruction at that first step, it failed to follow this court's *Balistrieri* decision. As before, this went to the heart of the individual plaintiffs' claim to recover; the error was not harmless.

The statute of limitations error arose because the instructions confused the date by which a suit had to be filed with the period of time for which recovery is possible for a continuing violation. The Fair Housing Act requires that a suit be filed within two years "after the occurrence or termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). No one argues that the plaintiffs' suit was late here. Instead, the problem is that the district court limited *damages* to those experienced by plaintiffs between April 1990 and April 1992, apparently believing that the two-year period also created a cut-off point for damages. In a suit claiming that the defendant engaged in a continuous course of conduct that causes damages, however, a plaintiff can recover for damages that preceded the limitations period if they stem from a persistent process of illegal discrimination. *Stewart v. CPC International, Inc.*, 679 F.2d 117, 121 (7th Cir. 1982); *McKenzie v. Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982); see generally, *Maskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 282 (7th Cir. 1993) (discussing continu-

ing violation doctrine). The jury may have thought that all the damages suffered between the two dates specified by the court were self-inflicted, given the mitigation instruction they had heard, and they may therefore have failed to look at the defendants' course of conduct as a whole.

Finally, the court clearly erred in granting judgment as a matter of law to the defendants on plaintiffs' claim for punitive damages. Like all questions concerning judgments as a matter of law, we review this one *de novo*. *Sokol Crystal Products v. DSC Communications*, 15 F.3d 1427, 1432 (7th Cir. 1994); *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 884 (7th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2994 (1993). Punitive damages are available in Fair Housing cases when a defendant has shown "reckless or callous disregard for the plaintiff's rights, [or] intentional violations of federal law." See *Balistrieri*, 981 F.2d at 936 (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The plaintiffs presented evidence of knowledge of the law and of intentional disregard of the law in implementing this particular advertising campaign. For example, plaintiffs showed that the Silvermans ran ads that omitted the fair housing logo, even though the Silvermans admitted that they knew that the law required its inclusion. This was enough to raise a jury question on the issue of the appropriateness of punitive damages.

D. Other Assertions of Error

Because we are remanding this case for a new trial, we see no need to provide an exhaustive discussion of other errors in this trial that may not recur. We comment here briefly only on some points raised on the appeal that have a reasonable chance of coming up again, in the hopes of moving the case along. Both plaintiffs and one of the *amici* argue that, if the district court was going to mention the HUD regulations applicable to advertising cases at all, it should have told the jury that the regulations

pointed to liability here, and that the jury should have deferred to those regulations. This, we believe, misapprehends the nature of the problem with the court's instructions. The judge told the jury that it could consider the regulations as examples of practices that might violate the Act, but that the regulations carried no legal weight and required no particular action. The mistake here was twofold. First, the judge should not have referred the jury directly to the regulations; it was the court's job to describe the law clearly to the jury so that it could decide whether the practices before it violated the Act. Second, the court was plainly wrong to state that the regulations had no legal effect. They do, and the substance of the court's instructions to the jury had to reflect the law accurately, including, where appropriate, rules set forth in HUD regulations. Thus, plaintiffs are right to object generally to the court's approach to the instructions, but the remedy was not to tell the jury about deference to administrative agencies under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It was instead to give the jury an accurate description of the legal rules governing discriminatory advertising.

Plaintiffs also claim that the district court erred in rejecting their proposed instruction directing the jury to evaluate the advertisements from the standpoint of "the ordinary African-American reader," rather than from the standpoint of a generic ordinary reader. In *Jancik v. Dept. of Housing and Urban Development*, 44 F.3d 553, 556 (7th Cir. 1995), this court held that an objective "ordinary person" standard should be used in determining what is "indicated" by an ad. The Fair Housing Act is violated "if an ad suggests to an ordinary reader that a particular [protected group] is preferred or dispreferred from the housing in question . . . [or the ad] would discourage an ordinary reader of a particular [protected group] from answering it." *Id.* The district court's instruction said that "[a]n ad expresses a preference, limitation, or discrimination if it would discourage an ordinary reader of a particular race from answering it. An ad may be simply a

neutral expression. The plaintiffs need not show that the defendants had a discriminatory intent." Bearing in mind the standard of review for jury instructions, we see nothing here that would have misled the jury or affected its understanding of the issues in a prejudicial way. See *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1283.

The remainder of the issues raised by both parties are better left to reconsideration by the new district court judge on remand. Both the relevance of the issues and the factual context in which they arise may be somewhat different. We hereby VACATE the district court's order awarding costs to the defendant, and we REVERSE and REMAND for further proceedings.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—12-6-96

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Decided January 6, 1997

Before

Hon: RICHARD A. POSNER, Chief Circuit Judge

Hon: FRANK H. EASTERBROOK, Circuit Judge

Hon: DIANE P. WOOD, Circuit Judge

ANTHONY TYUS, et al.,	) Appeal from
	) the United
Plaintiff-Appellants	) States
Cross-Appellees,	) District
	) Court for
v.	) the Northern
	) District of
	) Illinois,
URBAN SEARCH MANAGEMENT,	) Eastern
et al.,	) Division
	)Nos. 92C2423
Defendants-Appellees,	) & 93C5071
Cross-Appellants,	) Henry A.
	Mentz, Judge.[1]

ORDER

On consideration of the petition for rehearing filed on December 19, 1996 by counsel for defendants-appellees Diane Silverman, Urban Search Management and Development Management Group, all members

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[1]District Judge, U.S. District Court for the Eastern District of Louisiana, sitting by designation.

of the original panel have voted to **DENY** rehearing. Accordingly.

IT IS ORDERED that the aforementioned petition for rehearing be, and the same is hereby, **DENIED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY TYUS; THOMAS WALKER; HOPE FAIR HOUSING, INC.; LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES; INTER-FAITH HOUSING CENTER; and SOUTH SUBURBAN HOUSING CENTER,	No. 92 C 2423
Plaintiffs,	Judge Lindberg
v.	Magistrate Pallameyer
ROBIN CONSTRUCTION CORP.; SUDLER MARLING, INC.; BROOKFIELD DEVELOPMENT, INC.; LAKE BARRINGTON ASSOCIATES; EDWARD R. JAMES AND CO.; KENNETH J. JAMES AND CO.; J.S. JAMES CO., INC.; URBAN SEARCH MANAGEMENT; DEVELOPMENT MANAGEMENT GROUP, INC.; BEECHEN, DILL AND SPERLING BUILDERS, INC.; BRIAN KEITH, INC.; RON BERNS & ASSOCIATES, INC.; GREENE, CAMPBELL & WALN, INC.; SIEGEL COMMUNICATIONS, INC.; and UNTI, JOYCE SIEGEL, INC.,	
Defendants.	

ANTHONY TYUS; THOMAS WALKER; HOPE FAIR HOUSING, INC.; LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES; INTER-FAITH HOUSING CENTER; and SOUTH SUBURBAN HOUSING CENTER, Plaintiffs, v. LOUIS SILVERMAN and DIANE SILVERMAN, Defendants.	(Consolidated with No. 93 C 5071) (Judge Mentz by Designation)

JUDGEMENT

Considering the visiting judge's post-trial rulings and the jury's verdict of June 1, 1994, which addresses the claims against Defendants Louis Silverman, Diane Silverman, Urban Search Management, and Development Management Group, Inc., each of these Defendants is entitled to judgment in its favor. All other Defendants have been dismissed pursuant to settlement. (Robin Construction Corp. dismissed on January 28, 1993; Sudler-Marling, Inc. and Brookfield Development dismissed on August 20, 1993; Lake Barrington Associates, Edward R. James and Co., Kenneth J. James and Co., and J.S. James and Co., Inc. dismissed on September 15, 1995; Beechen Dill & Sperling Builders, Inc., dismissed on April 30, 1993; Brian Keith, Inc. dismissed on January 28, 1993; Ron Berns & Associates, Inc. dismissed on August 3, 1993; Greene, Campbell & Waln, Inc. dismissed on January 12, 1994; and Siegel Communications, Inc. and Unti, Joyce

& Siegel, Inc. dismissed on January 28, 1993.)

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Defendants Development Management Group, Inc., Urban Search Management, Louis Silverman, and Diane Silverman against the Plaintiffs, Anthony Tyus, Thomas Walker, Leadership Council for Metropolitan Open Communities, HOPE Fair Housing, Inc., Interfaith Housing, and South Suburban Housing Center. Defendants Robin Construction Corp.; Sudler-Marling, Inc.; Brookfield Development; Lake Barrington Associates; Edward R. James and Co.; Kenneth J. James and Co.; J.S. James and Co., Inc.; Beechen Dill & Sperling Builders, Inc.; Brian Keith, Inc.; Ron Berns & Associates, Inc.; Greene, Campbell & Waln, Inc.; Siegel Communications, Inc.; and Unti, Joyce & Siegel, Inc. are terminated pursuant to settlement.

Dated: November 21, 1995

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United States District Judge

MITIGATION INSTRUCTION

If you find a defendant is liable and a plaintiff has suffered damages, the plaintiff may not recover for any item of damage which he or it could have avoided through reasonable effort. If you find by a preponderance of the evidence that a plaintiff unreasonably failed to take advantage of an opportunity to lessen his or its damage, you should deny recovery for those damages which would have been avoided had he or it taken advantage of the opportunity.

You are the sole judge of whether a plaintiff acted reasonably in avoiding or minimizing his or its damages. An injured plaintiff may not sit idly by when presented with an opportunity to reduce his damages. However, a plaintiff is not required to exercise unreasonable efforts or incur unreasonable expenses in mitigation the damages. The defendant has the burden of proving the damages which the plaintiff could have mitigated. In deciding whether to reduce a plaintiff's damages because of a failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied his or its burden of proving that the plaintiff's conduct was not reasonable.

(R. 240, pp. 1207-08)

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No. 96-1558

In The

Supreme Court of the United States

October Term, 1996

LOUIS SILVERMAN; DIANE SILVERMAN; URBAN SEARCH MANAGEMENT; and DEVELOPMENT MANAGEMENT GROUP, INC.,

Petitioners,

v.

THOMAS WALKER; ANTHONY TYUS; HOPE FAIR HOUSING, INC.; LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES; INTERFAITH HOUSING CENTER; and SOUTH SUBURBAN HOUSING CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Opinion of the Court of Appeals for the Seventh Circuit is consistent with the opinions of this Court, and of other circuit and district courts in both fair housing and civil rights cases. Consequently, further review is not warranted. The issues before the Court are:

I. Does mitigation require an injured party to confront the wrongdoer or take affirmative steps to avoid the wrongdoer's illegal conduct?

II. Should the Court issue an advisory ruling on harmless error, given that the Seventh Circuit applied a strict standard in determining that a new trial was required?

III. With respect to the reversible error on the exclusion of experts, should the Court "hold" this case pending a ruling in *General Electric Co. v. Joiner*, No. 96-188, even though the Seventh Circuit correctly applied this Court's analysis established in *Daubert*?

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STATEMENT OF THE CASE

Petitioners' statement of the case omits or misstates a number of key facts. The evidence at trial established that Louis and Diane Silverman and their wholly-owned companies, Urban Search Management and Development Management Corporation (collectively, the "Silvermans"), engaged in an advertising campaign for The New York, a rental building located in Chicago, using thousands of ads depicting only white people and never an identifiable member of a minority group. R.239 at 30, 93, 98; R.270-1 at 356.[1]

Nearly half of The New York's newspaper ads and all of its billboards failed to include the Equal Housing Opportunity ("EHO") logotype, statement or slogan required by the Department of Housing and Urban Development ("HUD") regulations.[2] R.237 at 551. The ad

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[1] Contrary to the Petition (hereinafter "Pet.") at 4, the evidence did not establish that an advertisement depicted one African-American man entering Wrigley Field. Although the Silvermans' witnesses claimed for the first time at trial that a man in a crowd appeared to have a dark arm, his face was hidden. The evidence was uncontroverted that neither the Wrigley Field ad nor any of the Silvermans' other ads depicted the face of any identifiable minority. Even after this suit was filed, The New York's one integrated ad was published only in a publication in which The New York did not normally advertise. Petitioner's Appendix ("App.") 3.

[2] Section 3604(c) of the Fair Housing Act prohibits real estate advertising from expressing a preference based on race or color. 42 U.S.C. § 3604(c). The HUD regulations provide that all residential real estate ads should use the equal housing opportunity ("EHO") logotype, statement or slogan, 24 C.F.R. § 109.30(a), and they provide that an advertising campaign that depicts people "should be clearly definable as reasonably

campaign included radio advertisements targeted to white listening audiences, R.237 at 758-65,[3] and the radio ads also failed to include the required EHO statement.

The Silvermans' failure to follow the Fair Housing Act ("FHA") was especially egregious since they had received a $4 million Urban Action Development Grant to build The New York, and they enjoyed the benefit of $62.6 million in tax-exempt municipal bonds issued by the City of Chicago to further assist in construction, both of which obligated them to abide by non-discriminatory practices. App. 3.

The jury found that Louis Silverman caused racially discriminatory advertisements to be published, but awarded no damages. (Inexplicably, although the Silvermans had stipulated that all four defendants were responsible for all the ads, R.237 at 661-62, the jury found only Mr. Silverman liable.) The verdict established that the campaign was discriminatory. App. 4.[4]

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representing the majority and minority groups in the metropolitan area." 24 C.F.R. § 109.30(b). Furthermore, advertising campaigns that "cater to one racial or national origin segment" may violate the Act. 24 C.F.R. § 109.25(c).

[3] Petitioners understate the evidence when they claim that "five or six radio advertisements" failed to include the required EHO statement. Although there were six *different* radio advertisements that aired for The New York, R.239 at 164, each advertisement was aired hundreds of times. None of these hundreds of airings contained the required EHO language. R.270-1 at 438.

[4] Petitioners do not challenge the jury's finding that the ads were discriminatory: "The court also did not conclude that the evidence was insufficient to support the verdict." (Pet. at 6).

On December 6, 1996, Chief Judge Posner and Circuit Judges Frank Easterbrook and Diane Wood issued a unanimous opinion reversing the case and remanding for a new trial. Petitioners do not challenge the Seventh Circuit's findings of error in the instructions on actual injury, the statute of limitations and punitive damages; they focus solely on the court's rulings on the mitigation of damages instruction and the exclusion of plaintiffs' experts. In addition to these errors, the Seventh Circuit found that the misconduct of the Silvermans' trial counsel and the bias of the trial judge unfairly infected the trial, but in light of all the other reversible errors, declined to determine whether these errors alone would require a new trial. App. 5. In short, the Seventh Circuit's opinion did not limit the assignment of error to the exclusion of plaintiffs' experts and the four erroneous jury instructions, but found that these errors were "just the most egregious in a trial that suffered from many problems." App. 8.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO SIGNIFICANT ISSUE CONCERNING MITIGATION UNDER THE FAIR HOUSING ACT

The Silvermans argue that the Seventh Circuit broke with tradition in rejecting the instruction to the jury that plaintiffs could not recover for "any item of damage" that they could have avoided "through reasonable effort." And yet, as the Silvermans concede, the only evidence they offered for the alleged failure to mitigate was that plaintiffs (1) continued to examine local newspapers for The New York's ads after they suspected a discriminatory

pattern, and (2) chose not to give the Silvermans pre-filing notice of the lawsuit. Pet. at 7. This issue does not merit this Court's review because (1) the evidence Petitioners offered at trial would not show lack of mitigation in any context, (2) the Seventh Circuit's opinion is completely consistent with the case law on mitigation, and (3) the harmful interplay between the mitigation instruction and other erroneous rulings by the trial judge requires a new trial in any event.

A. The Mitigation Instruction Was Misleading Because, at Trial, Petitioners Did Not Offer Any Evidence of a Failure to Mitigate

While Petitioners repeatedly refer to the "traditional" duty to mitigate, *see, e.g.*, Pet. at 7, 8, they have been unable to offer a single authority suggesting that mitigation includes the proof they offered at trial: Plaintiffs' failure to (1) avert their eyes to avoid exposure to the discriminatory ads, or (2) confront the wrongdoers and ask them to cease their wrongful conduct before filing suit. The mitigation rules that Petitioners suggest are anything but "traditional"; indeed, they are unprecedented. Neither averting one's eyes nor giving "one free bite" is a form of mitigation. The difference here is that Petitioners argued – and the trial judge instructed the jury – that plaintiffs had affirmative obligations to *avoid* or *prevent* the defendants' misconduct, not *minimize plaintiffs' damages*. The concept of mitigation addresses only the latter, as even Petitioners' authorities teach. For example, Petitioners cite 1 Dobbs, *Law of Remedies*, ¶¶ 3-9 (1993), but Professor Dobbs stresses that the mitigation rules

> do not apply to every kind of damages measurement. In general, available consequences rules apply to require the plaintiff to minimize special or consequential damages, *but do not usually affect measurement of general or market damages.*

Id. at 380 (emphasis added).

Thus, while plaintiffs may have an obligation to *minimize* their damages, *see id.* at n.5, they need not conduct their affairs so as to avoid coming into contact with the defendant's illegal activity. The latter are direct or *general* damages, not *consequential* damages, which plaintiffs might have the ability to minimize. Another authority on which Petitioners rely, 4 Sand, *et al., Modern Federal Jury Instructions – Civil*, ¶ 77.01 (1996), also underscores the fact that mitigation applies only to *minimize damages;* it does not impose an obligation on the victim to avoid potential violations, or to prevail upon wrongdoers to mend their ways. *See also* Charles McCormick, *Damages*, § 37 at 137 (1935) (plaintiff need only "minimize"; "damaging consequences of *past* wrongful conduct"). Accordingly, the mitigation instruction had no place here.

Petitioners' contention that the Seventh Circuit's opinion "held that in a fair housing litigation, it is error as a matter of law to instruct the jury on mitigation of damages," *see* Pet. at 7, is flatly incorrect. The Seventh Circuit simply held that *"in the context of this case,"* the jury instructions misstated the law. App. 12 (emphasis added). Because mitigation does not require plaintiffs to pretend that discriminatory ads do not exist, nor to confront the offender, App. 12-13, and because at trial Petitioners offered no evidence of plaintiffs' failure to

minimize *consequential* damages, the trial judge's lengthy mitigation instruction was confusing and wrong.

B. The Seventh Circuit's Opinion is Consistent with the Rulings of Other Courts on Mitigation

1. Fair Housing Cases Require Mitigation Only for Tangible Damages

Petitioners attempt to portray the Seventh Circuit's opinion as out of the mainstream of fair housing cases that have discussed mitigation. But the Seventh Circuit discussed the very fair housing cases on which Petitioners rely, *Young v. Parkland Village, Inc.*, 460 F. Supp. 67 (D. Md. 1978), and *Miller v. Apts. & Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981), and agreed that mitigation instructions "*may* be appropriate for [fair housing] cases in which [the victim of discrimination] is denied housing." App. 12 (emphasis added). There is no question that there may be a need to mitigate the consequences of a *tangible harm*, like finding oneself homeless, as in *Young* and *Miller*. But this is a far cry from compelling victims of discrimination to confront the wrongdoers and give them another chance, or to cease investigating suspected discrimination in case they uncover more.

Unlike the tangible harms in *Young* and *Miller*, the injury at issue here was the diversion of the organizational Plaintiffs' efforts from counselling to litigation, *see, e.g., United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993), and the intangible injury that African-American home seekers experienced when confronted with The New York's discriminatory advertising campaign. App. 13. The Seventh Circuit concluded

that these types of organizational and intangible injuries do not typically lend themselves to mitigation, as is clear in the context of this case. Even Petitioners concede, Pet. at 9, that the only fair housing cases where mitigation has been applied involved the need to find substitute housing, *see Young* and *Miller*. Thus, there is no conflict.

In fact, *no* FHA authority suggests mitigation principles apply to intangible or organizational injury, or that mitigation requires the wronged parties to confront the wrongdoer or bury their heads in the sand. Indeed, Petitioners' mitigation instruction would require the plaintiff in *Miller* to warn the landlord that it was violating the FHA; even worse, if Mrs. Miller had any reason to suspect that the landlord might discriminate against her African-American husband, under Petitioners' version of mitigation, she would have had to refrain from applying for that apartment. Plainly, this is *not* the law. There is no split in authorities on the issue of whether plaintiffs in a fair housing case must avert their eyes or give pre-suit notice; these have *never* been held to be forms of "mitigation."

There are important reasons why fair housing plaintiffs cannot be required to stop examining discriminatory housing ads once they suspect discrimination. As the Seventh Circuit explained, because of the unique nature of discriminatory advertising, damage occurs gradually, as the all-white ads are repeatedly displayed.[5] A single

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[5] Here, The New York first ran a series of ads that told a story about a white couple, who were supposedly dating. To sue on just those ads would have been premature. The next phase of the campaign added The New York's real-life white concierge

all-white ad standing alone does not create the requisite pattern of discrimination that the FHA proscribes. App. 12. As *Balistrieri* explained: "The fact that the victim does not suffer the full effects of discrimination until he discovers the big picture does not change the fact that the defendant's discrimination was the primary cause of his harm," 981 F.2d at 933. Therefore, plaintiffs' repeated examination of The New York's ads was not "masochistic behavior," or a tactic "designed to run up the damages tab," it was the only way to tell if the campaign as a whole violated the FHA. App. 13. Any other rule would require plaintiffs to run into court upon seeing the first all-white ad, *see Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991), – a result the Fair Housing Act does not encourage.

The Seventh Circuit's ruling is also consistent with precedent of this Court, and there is no need to revisit it here. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), held that even testers – who, by definition, seek out the harm of an FHA violation, purposefully subjecting themselves to discrimination – can experience a "distinct and palpable injury." *Id.* at 373-74. Testing efforts are always "voluntary" or "self-inflicted," and yet they have been recognized as a vital method of supplementing government resources to enforce the FHA. Under Petitioners'

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and a white woman on an exercise machine – still perhaps not a "pattern of discrimination." It was only in 1991, when The New York printed a series of ads that depicted ten or more individuals, all of whom were identifiably white, without including a single identifiable minority, that the discriminatory pattern was unmistakable.

argument, however, testers would have to notify the suspected violator before their investigation began and would be barred from any recovery for their investigation. Petitioners' rule would tell both testers and actual home seekers who suspected discrimination to avert their eyes. There is no precedent for Petitioners' argument anywhere in the FHA case law.

2. No Civil Rights Case Has Ever Interpreted Mitigation to Require Giving Pre-Suit Notice or Avoiding a Defendant's Illegal Conduct

Even Petitioners' authorities outside the FHA do not suggest a different outcome. For example, *Murphy v. City of Flagler Beach*, 846 F.2d 1306 (11th Cir. 1988), held that a discharged police officer's loss-of-income damages must be reduced by the amount of his interim earnings – another example of minimization of *consequential* damages, not the avoidance of direct or general damages. In *Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985), the Seventh Circuit suggested that a prisoner complaining about segregated confinement might have to take reasonable steps to lessen her segregation, for instance, by accepting a job that would take her out of confinement, even though she would have preferred a different job. In *Tatum v. Morton*, 562 F.2d 1279, 1283 (D.C. Cir. 1977), the court held that the plaintiffs' refusal to post a ten-dollar bail might bear on the measure of damages suffered for continuing detention. And *O'Neal v. Gresham*, 519 F.2d 803 (4th Cir. 1975), held that an employee who claims wrongful discharge must make reasonable efforts to find a new job. Each of these authorities addresses minimization of consequential

damages, not avoidance of defendants' unlawful conduct, as Petitioners' mitigation theory would require.

None of Petitioners' cases even remotely suggests that a plaintiff has an independent obligation to give a defendant pre-suit notice of its wrongdoing.[6] Developers are expected to comply with the fair housing laws, and they are not entitled to "one free bite" until some private party brings their violation to their attention. As Judge Easterbrook noted at oral argument, while the lament that "you should have stopped me sooner" may be popular with criminal defendants, in neither the criminal nor civil context is this a valid defense to illegal conduct.

Petitioners' own brief concedes that mitigation never places an independent obligation on the plaintiffs, but simply ensures that the damages suffered were "attributable to the defendants' conduct." Pet. at 8. Yet in arguing for mitigation here, Petitioners try to do just that – force plaintiffs to assume independent duties to change their own conduct to avoid being exposed to a wrongdoer's deeds, or to advise defendants of their legal obligations and try to persuade them to follow the law. There is no authority for such a proposition, and this case would be a uniquely poor place to invent one.[7]

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[6] Not only would it invite speculation, allowing the party who failed to follow the law to argue that it would have done so if only it had been personally advised, but such a rule would impose an inappropriate burden on plaintiffs – one that Congress did not see fit to impose.

[7] Requiring pre-suit notice would be ironic here, since Defendant Louis Silverman boasted that he had lobbied members of Congress from Mikva to Rostenkowski in an

C. The Inappropriate Mitigation Instruction Interplayed with Other Errors by the Trial Judge

The lengthy and inappropriate mitigation instruction was bad enough by itself, but as the Seventh Circuit recognized, it also had an unfortunate interaction with the erroneous instruction on limitations. On the front end, the jury was told that it could not award any damages for discrimination that occurred before April 1990 because, the judge erroneously ruled, that period was outside the limitations period.[8] Yet, on the back end, Petitioners' counsel was allowed repeatedly to argue (and the jury was instructed) that plaintiffs had looked at the ads too long; any damage they may have suffered after the first few all-white ads was "self-inflicted" and could not support liability. *See* App. 15. This interplay of the erroneous limitations instruction with the erroneous avert-your-eyes instruction inevitably led the jury to conclude that there was *no time period* during which Plaintiffs suffered compensable damages.

The mitigation instruction was also exacerbated by the erroneous and confusing actual injury instructions.[9] The jury was not only instructed to consider "mitigation"

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attempt to secure the passage of the Fair Housing Act. R.270-1 at 416-18.

[8] Petitioners have not challenged the Seventh Circuit's conclusion that the limitations instructions were erroneous as a matter of law.

[9] Again, Petitioners do not contest the Seventh Circuit's conclusion that these instructions were erroneous as a matter of law.

as it related to the measure of damages; Petitioners' counsel was also allowed to argue that plaintiffs' injuries were "self-inflicted" and could not give rise to liability in the first place.[10] *See* App. 12, 15. This argument, coupled with the trial judge's instruction, injected error not only on the question of the *measure* of damages, but also on the question of whether "actual injury" had occurred at all.

II. THIS IS AN INAPPROPRIATE CASE IN WHICH TO REVIEW THE HARMLESS ERROR STANDARD

Petitioners ask this Court to evaluate the "harmless error" standard for the review of error in a trial court almost as an academic exercise, given that the Seventh Circuit applied the strictest standard. Although they ask the Court to grant *certiorari* to resolve what they claim is a split in the circuits over the harmless error standard in civil cases, there are at least three reasons why this is not the case in which to resolve such a split even if there were one. First, Petitioners failed to address it below, and therefore the Seventh Circuit never discussed it. Second, the Seventh Circuit applied the strictest standard. And third, a new trial would be required here regardless of the harmless error standard that applied.

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[10] Petitioners correctly recognize, Pet. at 12, that mitigation should never affect liability but only the *amount* of damages. And yet the trial judge allowed Petitioners' counsel to argue that any item of damage that could have been avoided by averting one's eyes or giving pre-suit notice did not count. *See* App. 12.

Because the Petitioners did not raise the issue of the possible variation in harmless error standards before the Seventh Circuit, the Seventh Circuit never had the opportunity to address it. Without an opinion below, Petitioners effectively ask this Court for an advisory opinion – something that this Court has traditionally refused. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (refusing to issue an advance expression of legal judgment); *New York v. O'Neill*, 359 U.S. 1 (1959) (refusing to answer a question posed by litigant where the lower court had not ruled on that issue below). Because the Seventh Circuit did not even address the issue, this is not a proper case in which to review the harmless error standard.

The second reason that this is not the case in which to resolve issues concerning harmless error standards is that an analysis of the Seventh Circuit's opinion shows that, in fact, it applied the strictest standard. Therefore, whatever standard is applied, the result would be the same. Petitioners claim there are four harmless error standards applied by the circuits, ranging from the lowest standard: whether the error "may" have an effect on the outcome, to the strictest standard: whether it is "highly probable" that the error had an effect on the outcome. Petitioners are incorrect, however, when they characterize the Seventh Circuit's standard as the lowest standard. In fact, the Seventh Circuit articulated a *strict* standard: "a new trial is appropriate only if it appears that the jury *was* misled and its understanding of the issues *was* seriously compromised, to the prejudice of the losing party." App. 11 (emphasis added). Applying that standard, the Seventh Circuit determined that "[r]egrettably, that standard is satisfied for four separate issues: mitigation of damages,

'actual injury,' the statute of limitations, and punitive damages."

Finally, because there were so many errors in this case, a new trial would be needed here regardless of which harmless error standard is applied. As the Seventh Circuit held, this "case must be reversed and remanded for a new trial, in light of *several critical* errors in both evidentiary rulings and the instructions. App. 2 (emphasis added).[11] Thus, the accumulation of errors in this case unquestionably requires reversal. *See also Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 188 (7th Cir. 1993) (even if individual errors were harmless, accumulation of errors required reversal). In light of the host of serious errors, the Seventh Circuit's analysis satisfies even the most stringent standard. Therefore, even if this Court were to conclude that a new trial is appropriate only if it was "highly probable" that the error affected the outcome, *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924 (3d Cir. 1985), that standard is easily met here. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (dismissing writ of *certiorari* where question upon which writ was granted was hypothetical and would make no difference to the litigants).

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[11] Here, the Seventh Circuit found error with nine different issues: defense counsel's "inexcusabl[e]" conduct, racial bias in jury selection, the judge's bias and misconduct, the exclusion of plaintiffs' proposed expert Dr. Tarini, the exclusion of plaintiffs' proposed expert Dr. Massey, the jury instruction on mitigation, the "actual injury" instructions, the statute of limitations instruction and the directed verdict on punitive damages. Petitioners challenge only the assignment of error related to the exclusion of plaintiffs' expert and the mitigation instruction.

III. THIS COURT SHOULD NOT "HOLD" THIS CASE FOR A DETERMINATION OF *GENERAL ELECTRIC V. JOINER*

In a last-ditch effort to avoid a new trial, Petitioners suggest that this case be held until a decision in *General Electric v. Joiner*, No. 96-188 (11th Cir., March 18, 1997), is issued. Even if the Court were to announce in *Joiner* a new rule regarding appellate review of the exclusion of experts, it would not impact the Seventh Circuit's decision here. The Seventh Circuit found that the trial judge did not apply the required analysis under *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993). App. 8-9. In fact, the trial court performed virtually no analysis in excluding Dr. Tarini and Dr. Massey. Therefore, the Seventh Circuit had little from the trial court upon which it could give the "deference" Petitioners demand. Indeed, the limited rationale the trial court did articulate caused the Seventh Circuit to find reversible error: "[t]he court below erred insofar as it assumed that only evidence completely inaccessible to the jury could come in under Rule 702." App. 10. According to *Daubert*, Federal Rule of Evidence 702 assigns "to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert*, 509 U.S. at 597. Therefore, the trial judge not only erred in failing to perform the analysis required by *Daubert*, but it applied an improper test for the admissibility of expert evidence. In short, the Seventh Circuit reviewed the trial court's scant analysis, followed this Court's dictates in *Daubert*, reviewed Dr.

Tarini's qualifications and his offer of proof, and concluded that the trial court had committed reversible error.[12]

Furthermore, because of the numerous other errors that require a new trial, to "hold" this case pending this Court's decision in *General Electric* would only clutter the Court's docket.

IV. THE OPINION BELOW MAY BE AFFIRMED ON ALTERNATE GROUNDS NOT RAISED BY PETITIONERS

Even if this Court were to grant *certiorari* on the issues raised by Petitioners, this case would still require reversal due to the numerous other errors that contaminated the entire trial. Aside from the two grounds for reversal with which the Silvermans take issue, the Seventh Circuit also found reversible error in the "actual injury" instructions, the statute of limitations instruction and the directed verdict on punitive damages.[13] In addition, there were numerous other errors where the Seventh Circuit found no need to decide whether they called for

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[12] The fact that the Seventh Circuit remanded to the trial court's discretion the issue of whether Dr. Massey's testimony would satisfy *Daubert* indicates that it was affording the district court the proper deference.

[13] The Silvermans mistakenly contend that the erroneous jury instructions identified by the Seventh Circuit only address the measure of damages. Pet. at 15. The Seventh Circuit made clear that these instructions "went to the heart of the individual plaintiffs' claim to recover," App. 14, and, therefore, impacted the jury's ability to find injury as well as damages.

reversal in light of the errors that easily met that standard. As discussed below, each of these additional assignments of error was properly decided by the Seventh Circuit and makes a new trial necessary in any event.

The Seventh Circuit found that the "actual injury" instructions may have misled the jury into thinking that intangible injury, such as emotional distress, was not a proper basis for liability. This instruction conflicted with settled Seventh Circuit law, *Balistrieri*, 981 F.2d 916, as well as the law of other circuits, *e.g.*, *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994); *Ragin v. Harry Macklowe Real Estate Co., Inc.*, 6 F.3d 898, 907 (2d Cir. 1993); *Spann v. Colonial Village*, 899 F.2d 24, 29 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990). This error explained the anomalous jury verdict: the ad campaign was discriminatory but there was no injury. App. 3-4.

As noted above, the trial judge instructed the jury to limit their consideration of The New York's ad campaign to a two-year time period prior to April 1992. R.240 at 1204-05. Section 3613(a)(1)(A) of the FHA is clear that the two-year limitation relates only to the time by which suit must be filed, not the time for which recovery is possible. Hence, the instruction was clearly wrong in light of plaintiffs' allegations that The New York's advertising campaign was part of a continuing violation. As discussed in Section I.C. above, the Seventh Circuit found that the interplay between this erroneous instruction and the erroneous mitigation instruction led the jury to believe that all of the damages plaintiffs suffered during the two-year period were self-inflicted. App. 15. The Seventh Circuit expressly found that not only the mitigation

instruction, but also the actual injury and statute of limitations instructions misled the jury and seriously compromised its understanding of the issues. App. 11.

The Seventh Circuit also found that the trial court erred in granting judgment as a matter of law on plaintiffs' claim for punitive damages, since the Silvermans admitted knowing about the FHA, and had expressly agreed to follow it as a condition of their government funding; yet they persisted in an ad campaign that violated the law. App. 15. The improperly directed judgment was an additional ground for a new trial. *Id.*

Although the Seventh Circuit did not reach the issue of whether the trial judge's bias and misconduct against plaintiffs and their case was so severe as to require a new trial, the impact of the trial judge's conduct was enormous. On appeal, plaintiffs raised numerous instances of improper judicial conduct. For example, in jury selection, the trial judge asked questions that were completely irrelevant to the case and which wrongly suggested to the jury that housing may legally be segregated by race. Even though "public" housing had no bearing on this case, the trial judge asked the following questions:

THE COURT: Does anybody on the panel reside in public housing? I am sure everybody knows what public housing is.

MR. JACKSON: Yes.

THE COURT: Would you stand up and tell us about it, please.

MR. JACKSON: Public housing?

THE COURT: I can't hear what you're saying.

MR. JACKSON: I didn't hear you.

THE COURT: Do you reside in public housing?

MR. JACKSON: Yes.

THE COURT: What is the name of it?

MR. JACKSON: Chicago Housing Development.

THE COURT: Chicago Housing & Development. Would the fact that you reside there – is that an Afro American housing or mixed?

MR. JACKSON: Mostly Afro-American.

THE COURT: Has there been any racial problems in that project?

MR. JACKSON: Yes.

THE COURT: Would that interfere in any way with you coming up with a fair and impartial verdict if you're selected on a jury?

MR. JACKSON: I can't really say.

R.238 at 76-77.

As the Seventh Circuit found, this questioning "injected a note of prejudice into the trial that plaintiffs had no way of overcoming, because the entire group of prospective jurors was exposed to it." App. 7. Moreover, the court found that the questioning stigmatized not only Mr. Jackson, but also plaintiffs and their entire case, since

it implied that "racial problems might arise if African-Americans were present." *Id.* Although the Seventh Circuit found no need to consider whether this error alone would have required reversal, when coupled with all the other errors that Petitioners do not challenge, its impact was severe. *See, e.g.*, R.237 at 571; R.239 at 228; R.239 at 197; R.237 at 567 (trial judge made erroneous statements of fact and law throughout the trial); R.237 at 615; R.270-1 at 454-56 (trial judge made inappropriate remarks that trivialized the issues).

The Seventh Circuit found additional error in the conduct of the Silvermans' counsel:

> We have nothing good to say about the tone of this trial, and we emphasize how important it is for judges, attorneys, and litigants alike to treat everyone in the court with respect, in an atmosphere free of racial, sex-related or other forms of bias. *Defense counsel behaved inexcusably* . . . Personal attacks on counsel and remarks that disparage others on the basis of sex or race have no place in the courtrooms of this Circuit.

App. 5 (emphasis added). The Seventh Circuit declined to consider whether this error alone called for reversal, but given the magnitude of counsel's misconduct, there is no doubt that if the case had not been reversed for other reasons, this impropriety would require a new trial. *See, e.g.*, R.270-1 at 505 (Silvermans' counsel grabbed exhibit out of the hands of plaintiffs' counsel); R.270-1 at 486-87 (Silvermans' counsel referred to one of plaintiffs' counsel as an "amateur" and "some kid"); R.271-1 at 270-1 at 505 (Silvermans' counsel referred to plaintiffs' counsel's actions as "amateur night" and "amateur conduct");

R.270-1 at 488-87 (Silvermans' counsel ordered plaintiffs' counsel to "sit down" and "stop interfering"); R.238 at 7-9; R.240 at 1219 (Silvermans' counsel used evidence in direct violation of an order *in limine*). (All this, the Seventh Circuit noted with disapproval, occurred in the jury's presence and was without any reprimand from the trial judge. App. 5.)

The Seventh Circuit also found that the jury instructions not only failed to give any deference to the HUD regulations, App. 15-16, but erroneously told the jury that the HUD regulations had no legal effect. (*Id.*)

Finally, plaintiffs identified other errors that the Seventh Circuit saw no need to address in light of the overwhelming number of other errors calling for a new trial. These included (1) the inconsistency in the jury's verdict finding Louis Silverman but not his co-defendants liable despite a stipulation that *all* of the defendants were responsible for all of the ads, (2) *Batson* violations, (3) the failure to instruct the jury of the organizational plaintiffs' right to damages for their legal efforts, and (4) a variety of evidentiary errors, *see, e.g.*, R.241 at 1137; R.237 at 639 (admission of hearsay evidence regarding racial composition of the building). Even if Petitioners' attacks on the Seventh Circuit's mitigation and *Daubert* rulings and its standard for harmless error had some merit, this multitude of additional errors would provide more than adequate basis for affirming the Seventh Circuit's decision to remand for a new trial.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

LOUIS SILVERMAN, DIANE SILVERMAN,
URBAN SEARCH MANAGEMENT
and DEVELOPMENT MANAGEMENT GROUP, INC.
Petitioners,

v.

THOMAS WALKER, ANTHONY TYUS, HOPE FAIR
HOUSING, INC., LEADERSHIP COUNCIL
FOR METROPOLITAN OPEN COMMUNITIES;
INTERFAITH HOUSING CENTER and
SOUTH SUBURBAN HOUSING CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. WHETHER MITIGATION OF DAMAGES PRINCIPLES APPLY IN THE FAIR HOUSING CONTEXT RAISES COMPETING POLICY CONCERNS, AND IS AN IMPORTANT QUESTION WHICH SHOULD BE DECIDED BY THIS COURT[1]

Respondents do not contest that whether mitigation of damages applies in Fair Housing Act cases is an important question that raises significant policy concerns.[2] Nonetheless, in an effort to avoid review of that question in this case, respondents claim, first, that, as a procedural matter, the issue does not arise in this case because, according to respondents, there was no proof at trial that plaintiffs had failed to mitigate their damages (Opp. at 4-6); and second, that the Seventh Circuit's decision is "consistent" with other decisions on mitigation of damages. (Opp. at 6-8) Neither argument has merit.

As to the first, the district court found that there was sufficient evidence to justify giving a mitigation of damages instruction. The plaintiffs testified that they attended weekly meetings over a three year period to "monitor" the allegedly discriminatory advertisements, and that they incurred legal and other expenses in connection with this monitoring process. Had they notified the defendants of their belief that the ads were offensive, or had they commenced their

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[1] The disclosure statement required by Rule 29(6) of the Rules of the Court was included in the Petiton at p. ii.

[2] The relevant portion of the Fair Housing Act, 42 U.S.C. § 3604(c), is reproduced in the Petition at pages 1-2.

lawsuit earlier, their damages would have been minimized.

Based on the plaintiffs' own testimony, the district court correctly concluded that there was sufficient evidence for a jury to be given a traditional charge on mitigation of damages. The Court of Appeals did not dispute the district court's factual determination that the evidence supported a mitigation instruction. Instead, the Court held, as a broad principle of law, that, under the Fair Housing Act, "mitigation is not required for intangible losses or organizational claims." (App-12)

Respondents next argue that this principle does not break new ground because no case has ever required plaintiffs to give notice before bringing suit, or to avoid the offensive advertisements in order to prevail. But the mitigation instruction in this case did not charge the jury that plaintiffs were required to notify the defendants, and it did not charge the jury that plaintiffs could not prevail because they took no steps to shield themselves from the allegedly harmful conduct.

The instruction at issue in this case (reproduced in the Petition at App-23) addressed damages only. It made crystal clear that plaintiffs could not recover for damages they could have avoided with reasonable care, and it placed the burden of proving "the damages which plaintiffs could have mitigated" on the defendants. (App-23) Thus, unless, as a matter of law, Fair Housing plaintiffs are exempt from traditional mitigation requirements, the instruction itself was appropriate.

Respondents seem to believe that because they did not prevail at trial, the jurors must have misinterpreted the mitigation instruction to address liability and not damages. Not only this there no basis for that assumption, it is not reason for this Court to avoid review of an otherwise substantial question.

Respondents also suggest that, because of the supposedly unique nature of claims based on discriminatory advertisements, there are policy reasons for excusing Fair Housing plaintiffs from traditional mitigation requirements. (Opp. at 7-8) Petitioners have argued that there are compelling policy reasons for adhering to well-established law -- that, in fact, mitigation advances rather than impedes the goals of the Fair Housing Act. (Pet. at 11-12)

The Seventh Circuit adopted the respondents' view and its decision is likely to be influential. The fact that there are competing policy concerns is yet another reason why the issue is important and is deserving of this Court's review.

II. THIS CASE CLEARLY PRESENTS THE CONFLICT IN THE CIRCUITS ON THE HARMLESS ERROR STANDARD IN CIVIL CASES

The respondents do not dispute that the Circuits are hopelessly in conflict over the proper standards to apply in determining harmless error in the civil context. Instead, the respondents argue that this issue was not raised in the Seventh Circuit so this Court should not address it now. (Opp. at 12-13) In their brief to the Court of Appeals, petitioners argued that each of the challenged errors was harmless. The fact that the Seventh

Circuit chose to apply a particular harmless error standard (and one that eviscerates the harmless error concept), does not insulate the question from this Court's review.

Next, the respondents claim that the Seventh Circuit applied the strictest standard so the outcome of the case would be the same regardless of what standard was applied. (Opp. at 13-14) Respondents misunderstand the meaning of "strictest" and "loosest" in this context. The so-called strictest standard is the standard that is used in criminal cases, and that makes it more likely, not less likely, that an error will not be considered harmless. Although a number of Circuits have adopted the criminal standard, several Circuits have expressly rejected that standard in civil cases, determining that, because of the lower burden of proof in civil cases, a less strict standard should be applied, and one that is less likely to result in a reversal of the jury verdict. (Pet. at 14-15)

In this case, the Seventh Circuit went even further than the criminal standard and held that reversal was warranted if the verdict "may have been influenced" by any one of the alleged instructional errors (App-11), a standard so strict that it virtually compelled reversal once an error was found. Moreover, the Court did not even engage in a harmless error analysis before determining that a new trial was warranted because of the exclusion of the expert witness, Dr. John Tarini. (App-8-11)

Finally, respondents claim that because the Seventh Circuit found several errors in the evidentiary rulings and instructions, the jury verdict would be

reversed under any standard. (Opp. at 14) That also is untrue. The Seventh Circuit reversed as to three of the defendants -- Diane Silverman, and the two corporate defendants -- even though the jury found that those defendants were not responsible for the allegedly discriminatory advertisements. None of the alleged errors resulting in reversal went to the factual question of who bore responsibility for the challenged advertising campaign. The excluded expert would have testified about the nature of plaintiffs' alleged injuries, and not the individual responsibility of each of the separate defendants, and the allegedly erroneous instructions went to the measure of damages only. Had a different and less stringent harmless error standard been employed, the result (at least as to Diane Silverman and the corporate defendants) undoubtedly would have been different.

As respondents concede, the Circuit Courts have differed on what standard should be used in evaluating the impact of an error in a civil case. To the extent the Seventh Circuit engaged in any harmless error analysis in this case, it used, we submit, the wrong standard. The conflict should be resolved by this Court.

III. THE PETITION SHOULD BE HELD PENDING RESOLUTION OF GENERAL ELECTRIC v. JOINER

Respondents argue that no matter how this Court decides General Electric v. Joiner, No. 96-188 (March 18, 1997), granting certiorari to, 78 F.3d 524 (11th Cir. 1996) it would have no impact on the Seventh Circuit's evaluation of the propriety of the district court's exclusion of the expert witness, Dr. Tarini. Respondents cannot fairly make that claim.

The Seventh Circuit did not posit any standard of review in reversing the jury verdict on the basis of the lower court's decision to exclude Dr. Tarini. Certainly, it did not apply deference to the district court's ruling, ignoring entirely the court's conclusion that the expert lacked the qualifications necessary to testify about "the particular question he [was] being offered on." (R.270-1, p.298, 302)

In Joiner, this Court will examine the proper standard of appellate review of a trial court's decision excluding expert testimony. If the Court determines that the type of de novo review engaged in by the Seventh Circuit in this case is improper, this case should be remanded so that the Court can review the issue employing the proper standard of review. The Court, therefore, should hold this petition until Joiner is resolved.

IV. THE OTHER ALLEGED ERRORS ARE EITHER RAISED IN THE PETITION OR DO NOT MILITATE AGAINST GRANTING THE PETITION

As a final point, respondents argue that a grant of certiorari should be denied because no matter how this Court decides the questions presented, reversal of the jury verdict would still be warranted. There are several problems with this argument.

First, if this Court were to decide that traditional mitigation of damages principles are applicable in the Fair Housing context, even if a new trial were to take place, the defendants would be entitled to a mitigation instruction if the evidence, at retrial, warranted it. Thus, the issue remains important regardless of whether the Seventh Circuit's decision

reversing the jury verdict is upheld on other grounds.

Second, since petitioners have challenged the entire Seventh Circuit ruling on the ground that the Court employed the wrong standard of appellate review, if this Court were to agree that a less stringent standard of harmless error is proper, the Court would presumably vacate the Seventh Circuit's opinion.

The Court might then conclude that the challenged errors were harmless as a matter of law and affirm the jury verdict. Or the Court might determine that a remand is necessary so that the Seventh Circuit can reconsider the case in light of this Court's opinion. Often, after certiorari is granted, there is a remand to the Court of Appeals with that type of instruction. On remand, the Court of Appeals may reach the same conclusion as it did the first time it reviewed the case. But that is not a reason to deny certiorari in the first instance.

Finally, the Seventh Circuit did not decide that a new trial was warranted because of the alleged improprieties of the trial judge or of trial counsel. Those issues are irrelevant to the outcome of this Petition and are not before this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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